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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Brookstone Company, Inc.

Serial No. 75/449,323

Teresa C. Tucker for Brookstone Company, Inc.

Yong Oh (Richard) Kim, Trademark Examining Attorney, Law Office 115, (Thomas Vlcek, Managing Attorney).

Before Simms, Hanak and Bottorff, Administrative Trademark Judges.

Opinion by Hanak, Administrative Trademark Judge.

Brookstone Company, Inc. (applicant) seeks to register THERASPA in typed drawing form for "electric massage apparatus, excluding hydrotherapy devices." The intent-to-use application was filed on March 12, 1998.

Citing Section 2(d) of the Trademark Act, the Examining Attorney has refused registration on the basis that applicant's mark, as applied to applicant's goods, is likely to cause confusion with the mark THERASPA, previously registered in the form shown below for "hydrotherapy instruction booklets and cards." Registration No. 1,780,267.

When the refusal to register was made final, applicant appealed to this Board. Applicant and the Examining Attorney filed briefs. Applicant did not request an oral hearing.

In any likelihood of confusion analysis, two key, although not exclusive, considerations are the similarities of the marks and the similarities of the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.")

Considering first the marks, they are virtually identical. The cited mark is THERASPA with a capital "S" enclosed in a rectangle and applicant's mark is THERASPA in typed drawing form. Thus, in terms of pronunciation, the two marks are identical. Likewise, in terms of connotation, the two marks are identical in that they bring to mind a spa that provides therapy. Finally, in

terms of visual appearance, the rectangle in the cited mark does little to distinguish said mark from applicant's mark. Moreover, because applicant's mark is in typed drawing form, applicant

would be free to depict its mark with a capital "S," as does registrant.

Thus, the first Dupont "factor weighs heavily against applicant" because the two word marks are virtually identical. In re Martin's Famous Pastry Shoppe Inc., 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984).

Turning to a consideration of applicant's goods and registrant's goods, we note that because the marks are virtually identical, their contemporaneous use can lead to the assumption that there is a common source "even when [the] goods or services are not competitive or intrinsically related." In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993). However, in this case we find that applicant's electric massage apparatus excluding hydrotherapy devices are clearly related to registrant's hydrotherapy instruction booklets

and cards. Indeed, at page 5 of its brief, applicant appears to concede that its goods and registrant's goods are at least somewhat related. In this regard, we note that applicant concedes that "massage therapy and hydrotherapy may both fall in the category of 'alternative medicine,'" and that "both may be treatments that are complementary."

In addition, the Examining Attorney has made of record literally dozens of articles from magazines and newspapers demonstrating that massages and hydrotherapy treatments are often marketed together in a single package. For example, an article appearing in the February 1, 1999 edition of Town & Country Monthly talks about a $150 Head and Sole package which provides a massage and "ends with a hydrotherapy treatment." An article appearing in the April 9, 1999 of the Austin American-Statesman contains the following sentence: "Hydrotherapy -- a hot shower, a hot tub, a swim in the pool -- and massage are great ways to reduce soreness after a run." The line between massages and hydrotherapy treatments is further blurred by the fact that a number

of articles discuss “hydrotherapy massages.” For example, an article appearing in the March 28, 1999 edition of The Fort Worth Star-Telegram describes a “hydrotherapy massage” as “a high-pressure water massage.”

In short, given the fact that the marks are virtually identical, we find that consumers who are familiar with registrant’s THERASPA hydrotherapy booklets and cards would, upon encountering applicant’s THERASPA electric massage apparatus (excluding hydrotherapy devices), assume that both

products were manufactured by a common source, or that at a minimum, both products were sponsored by a common source.

Finally, we note that applicant argues that because there has been no actual confusion, this is evidence that there is no likelihood of confusion. (Applicant’s brief page 10). Two comments are in order. First, proof of actual confusion is extremely hard to come by, and thus proof of actual confusion is not a prerequisite to a finding of likelihood of confusion. Second, we note that

applicant has been marketing its THERASPA electric massage devices for only one year. Thus, there has been very little chance for actual confusion to have occurred.

Finally, we note that to the extent that there are any doubts on the issue of likelihood of confusion, said doubts must be resolved in favor of registrant and against applicant. In re Hyper Shoppes (Ohio) Inc., 837 F.2d 463, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988).

Decision: The refusal to register is affirmed.